IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RELATIONAL FUNDING CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 01-821-SLR
	)	
TCIM SERVICES, INC.,	)	
	)	
Defendant.	)	

R. Karl Hill, Esquire of Seitz, Van Ogtrop & Green, P.A., Wilmington, Delaware. Counsel for Plaintiff. Of Counsel: Vincent T. Borst, Esquire and Jennifer L. Jerzy, Esquire of Askounis & Borst, P.C., Chicago, Illinois.

Elizabeth M. McGeever, Esquire and Paul A. Fioravanti, Jr., Esquire of Prickett, Jones & Elliot, P.A., Wilmington, Delaware. Counsel for Defendant. Of Counsel: Michael L. Kichline, Esquire and Thomas A. Lincoln, Esquire of Dechert Price & Rhoads, Philadelphia, Pennsylvania.

OPINION

Dated: February 24, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On December 11, 2001, plaintiff Relational Funding Corporation filed this action against defendant TCIM Services, Inc., alleging damages for breach of contract. (D.I. 1) The court has jurisdiction over the matter pursuant to 28 U.S.C. § 1332. On September 15, 2003, the court conducted a single day bench trial on plaintiff's claims for breach of contract. Having considered the evidence and testimony, the court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

II. FINDINGS OF FACT

1. Plaintiff is an Illinois corporation with headquarters located in Rolling Meadows, Illinois. (D.I. 1) Plaintiff's primary business activity is investing in technology equipment lease transactions requiring an equity infusion. (D.I. 87 at 8-9)

2. Defendant is a Delaware corporation with headquarters in Wilmington, Delaware. (D.I. 20) Defendant's primary business is providing inbound and outbound calling services. (Id. at 239)

3. Varilease Corporation ("Varilease") is a lessor that specializes in technology equipment leasing.[1] (D.I. 87 at 114)

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[1]Varilease was named as a third-party defendant in defendant's third-party complaint, filed May 16, 2002. (D.I. 21) Defendant amended its third-party complaint on June 24, 2002, after learning that Varilease had been acquired by Unicapital Corporation. (D.I. 33) Apparently, Unicapital declared bankruptcy prior to the filing of the amended third-party complaint but, despite a return of service being executed on June

4. On December 16, 1997, defendant, as lessee, entered into a finance lease for computer equipment with Varilease, as lessor (the "Master Lease"). (PTX 1) At issue in the present case is the first of thirteen schedules under the Master Lease ("Schedule 1"). (PTX 2)

5. Schedule 1 provided for the lease of 454 desktop computers, 276 monitors and 9 laptop computers (the "Equipment"). (PTX 14) As of December 17, 1997, all of the Equipment was fully installed at defendant's premises. Walter J. Kern III, defendant's senior vice president of finance, prepared a list acknowledging receipt of the Equipment. (PTX 2) The initial term for Schedule 1 was from January 1, 1998 to December 31, 2000. The base monthly rental payments were in the amount of $18,966.62.

6. On December 18, 1997, Varilease assigned its rights under the Master Lease to Nationsbanc Leasing Corporation ("Nationsbanc"), pursuant to a nonrecourse note and security agreement. (PTX 25) Pursuant to that assignment, Nationsbanc would receive all of the monthly rental payments due under the initial term of the Master Lease, but Varilease retained ownership of the Equipment. The assignment to Nationsbanc was an intended component of the lease transaction between defendant and

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25, 2002, Varilease has failed to enter an appearance or file a notice of bankruptcy in this court. (D.I. 38)

Varilease.

7. On January 1, 1998, Varilease sold the Equipment to plaintiff and assigned all of its rights, title and interest in the Master Lease. Under the Master Lease, defendant expressly consented to any assignment, therefore, although defendant did not receive notice of the assignment to plaintiff, such notice was not required for the assignment to be effective. (PTX 1, ¶ 10(a))

8. At the time of Varilease's sale of the Equipment and assignment of the Master Lease to plaintiff, plaintiff and Varilease entered into a remarketing agreement, whereby Varilease agreed to act as plaintiff's exclusive marketing agent for the purposes of marketing the Equipment to defendant upon expiration of the base term of the lease. (PTX 4; D.I. 78 at 3)

9. Jack Malchak negotiated the transaction with defendant on Varilease's behalf. During the course of the lease negotiation, Malchak was the sole contact person between Varilease and defendant. (Id. at 132-133) After the Master Lease was executed, Malchak remained defendant's sole point of contact with Varilease.

10. It was Malchak's practice to request clients to send notices and letters to his Maryland business office, rather than Varilease headquarters, so that he could control and monitor the communications. (Id. at 142) Consistent with that practice,

Malchak did send and receive correspondence with defendant at his Maryland office. (Id. at 141-45)

11. During the period following the sale and assignment to plaintiff, Malchak continued to receive correspondence from defendant required under the Master Lease at his Maryland business address. (DTX 6, 7)

12. On June 1, 2000, Kern sent to Malchak a letter indicating defendant's intent to terminate Schedule 1 at the completion of the initial term. (PTX 6) The letter was sent by ordinary mail to Malchak's Maryland business address. On September 15, 2000, Kern sent a second letter to Malchak restating defendant's intent to terminate Schedule 1, and requesting shipping instructions for the Equipment. (PTX 7) That letter was sent by ordinary mail to Malchak's Maryland business address. On April 26, 2001, defendant sent a third letter to Malchak requesting shipping instructions for Schedule 1. (DTX 43) Malchak denies receiving the June 1 letter, but acknowledges receipt of the letter dated September 15, 2000. (D.I. 87 at 123, 128)

13. On May 2, 2001, Malchak sent an email to Kern indicating that Schedule 1 "is being extended for an automatic 6 months because of missed notice which we should have received by June 1, 2000." (DTX 48) That email indicated that a second six month extension would result if defendant did not give notice as

to the disposition of Schedule 1. On June 6, 2001, Malchak sent a second email stating that he still had not received a response or notice from defendant concerning Schedule 1. (DTX 49)

14. In August 2001, plaintiff took direct responsibility for managing its account with defendant. On September 17, 2001, following an exchange of correspondence, plaintiff directed defendant to ship the Equipment to CDI Computers, located in Tonowanda, New York ("CDI"). (D.I. 69; D.I. 78 at 4)

15. CDI, plaintiff's wholly owned subsidiary, serves as an intermediary in the reclamation of used leased computer equipment. CDI purchases, tests, refurbishes and resells the used computer equipment. (D.I. 87 at 165) Damaged equipment will be scrapped and not resold. (Id. at 176) CDI employees conduct an audit of incoming equipment, detailing model information, serial number, hardware configuration and condition of received equipment. CDI provides an audit report to plaintiff (the "CDI report"). The equipment is then purchased from plaintiff by CDI. Based upon the CDI audit, plaintiff will assess a lessee for charges related to returned equipment. (D.I. 87 at 168)

16. Defendant's shipping records show that the Equipment was sent to CDI beginning on September 28, 2001. (D.I. 78 at 4) According to plaintiff's records, the final shipment was received by CDI on May 2, 2002. (PTX 23) In October 2001, consistent

with its agreement with plaintiff, CDI prepared an audit report for the Equipment received from defendant. (D.I. 87 at 169; PTX 13) CDI then purchased the Equipment from plaintiff and presumably resold it. (D.I. 87 at 172)

17. A total of 252 desktop computers, 4 laptop computers, and 282 monitors were shipped by defendant to CDI. (PTX 14) Consequently, a total of 202 desktop computers and 4 laptop computers remain unreturned and an excess of 6 monitors were returned. The CDI report also indicates that some of the Equipment was returned in damaged condition and/or missing specified components. (PTX 13)

18. Defendant disputes the accuracy of the CDI report with respect to the Acer computers, which account for 221 of the desktop computers on Schedule 1. According to the CDI report, nearly all of these computers were returned without either a hard drive or a floppy drive. (Id.) Defendant contends that the original configuration for the Acer computers did not include either a hard drive or a floppy drive. Attachment A to Schedule 1 corroborates defendant's contention.[2] (PTX 2) Consequently,

[2]Attachment A indicates that other computer systems had hard drives while it does not indicate that for the Acer computers. With respect to the absence of floppy disk drives, plaintiff offered no documentary evidence that the original configurations contained floppy disk drives. Instead, plaintiff's sole evidence is the testimony of its remarketing manager, who testified that he relied solely on the CDI report and Schedule 1. (D.I. 87 at 215-16) Kern's testimony that the Acer computer configuration did not include floppy disk drives as they were intended for a

to the extent the Acer computers did not have either hard drives or floppy drives, the court finds that they were returned consistent with their original configuration.

19. With the exception of the Acer computers, the court finds the CDI report to be credible and unrebutted evidence of the condition of the Equipment returned by defendant.

III. CONCLUSIONS OF LAW

20. Under Michigan law, to prove a breach of contract claim a plaintiff must prove the existence of a valid contract and "must then prove by a preponderance of the evidence the terms of the contract, that the defendant breached the terms of the contract, and that the breach caused the plaintiff's injury." In re Brown, 342 F.3d 620, 628 (6th Cir. 2003).

21. The parties have stipulated the validity of the Master Lease, which is a finance lease, and that Michigan law governs the present dispute. (D.I. 78) Michigan has adopted Article 2A of the Uniform Commercial Code concerning leases. See Mich. Comp. Laws. § 440.2802 (2003).

22. The Master Lease provides that:

> All notices, consents or requests desired or required to be given under the Lease shall be in writing and shall be delivered in person or sent by certified mail, return, receipt requested, or by courier service to the address of the other party set forth in the introduction of the Master

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particular network use provides a reasonable explanation that is supported by the CDI report. (Id. at 294)

> Agreement or to such other address as such party shall have designated by proper notice.

(PTX 1, ¶ 18(c)) The specified address for Varilease is its headquarters in Farmington Hills, Michigan and, for the defendant, its headquarters is in Wilmington, Delaware.

23. Article 2A provides that subsequent conduct may operate as a waiver of an express contractual requirement, even if the contract requires that all subsequent modifications be made in writing. Mich. Comp. Laws. § 440.2858(3). Article 2A also permits course of performance to be considered to supplement or explain the agreement, notwithstanding the existence of a writing intended to by the final expression of the parties. Mich. Comp. Laws. § 440.2852 (2003). Course of performance is admissible regardless of whether the terms of the contract appear unambiguous. Mich. Comp. Laws. § 440.2202.

24. Under the Master Lease, defendant's duty to perform to plaintiff as assignee could only arise after it had received notice of the assignment. (PTX 1, ¶ 10) As defendant did not receive notice of the assignment to plaintiff, to terminate the lease defendant was only obligated to direct notice to Varilease. This conclusion is further supported by the remarketing agreement between plaintiff and Varilease, in which Varilease remained responsible for remarketing the Equipment as plaintiff's express agent. (DTX 48, 49)

25. The court further finds that a course of performance existed with respect to correspondence between Varilease and defendant. At Malchak's encouragement, if not his insistence, defendant sent correspondence by ordinary mail to Malchak at his Maryland address. Malchak would often use email to send requests to defendant, notwithstanding the Master Lease's requirements to the contrary.[3] While either of the parties could have insisted that future correspondence strictly conform with the notice provisions at any time, no such request was ever made.

26. While the form of defendant's notice did not comport with the express requirements of the Master Lease, the court concludes that the course of performance between the parties acts as a waiver of the express requirement as to the form of notice. Consequently, if defendant provided notice to Varilease in a manner consistent with the course of performance between the parties, the termination is effective.

27. In the present case, there is evidence that a letter was sent by ordinary mail on June 1, 2002. Defendant provided sufficient evidence to show that the letter was in fact dispatched. Malchak denied receiving the June 1 letter.

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[3]Malchak's testimony regarding his business practices is undisputed. He requested that the clients with whom he worked send their correspondence to him, which he would forward to Varilease's Michigan headquarters. He did not request that notices be sent certified, and he himself used email to send requests to defendant.

28. Michigan courts follow the minority rule that where there is evidence to show that a letter was mailed, there is a rebuttable presumption that the letter was received. See Good v. Detroit Auto. Inter-Ins. Exchange, 241 N.W.2d 71, 74 (Mich. App. 1976) ("It is presumed that a letter mailed in the due course of business is received.").

29. The court finds that Malchak's denial, in light of the evidence regarding his handling of defendant's correspondence, is insufficient evidence to rebut the presumption that the letter was received.[4] Consequently, the court concludes that defendant sent effective notice of its intent to terminate Schedule 1 prior to June 30, 2000 and, therefore, the Master Lease expired on December 31, 2000.

30. Plaintiff contends that it is entitled to rent, regardless of whether defendant's notice was effective, because the equipment has not been fully returned. Plaintiff also

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[4]This is a case in which the parties agree that a miscommunication has occurred, but neither party believes it is responsible. It is clear to the court that the breakdown in communication rested with Malchak. As his testimony indicated, Malchak was largely responsible for communicating with defendant on behalf of Varilease. As his emails indicate, even after the assignment of the Master Lease to plaintiff, Malchak continued to serve as the conduit for communication.

Malchak's testimony regarding the communications and the correspondence is inconsistent. While he testified to having received Kern's September 15, 2000 letter and April 26, 2001 letter, Malchak's emails in the spring of 2001 suggest that no correspondence at all was ever received from defendant as to Schedule 1. (D.I. 78 at 145-46)

contends that this right is subject to the Master Lease's "hell or high water" provisions and, therefore, not subject to counterclaims, set-offs, or defenses.[5]

31. Paragraph 6(d) of the Master Lease states: "Until the return of the Equipment to Lessor, Lessee shall be obligated to pay the Base Monthly rental and all other sums due under the Lease." (PTX 1, ¶ 6(d))

32. The court concludes that the "hell or high water"

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[5]Section 5 of the Master Lease provides:

> Lessee's agreement to pay all obligations under the Lease, including but not limited to Base Monthly Rental, is absolute and unconditional and such agreement is for the benefit of Lessor and its Assignee(s). Lessee's obligations shall not be subject to abatement, deferment, reduction, setoff, defense, counterclaim or recoupment for any reason whatsoever.

(PTX 1, ¶ 5) Section 10, which relates to assignment, states:

> Lessee's obligations under the lease with respect to Assignee shall be absolute and unconditional and not be subject to any abatement, reduction, recoupment, defense, offset or counterclaim for any reason, alleged or proven, including, but not limited to, defect in the Equipment, the condition, design, operation or fitness for use of the Equipment or any loss or destruction or obsolescence of the Equipment or any part, the prohibition of or other restrictions against Lessee's use of the equipment, the interference with such use by any person or entity, any failure by Lessor to perform any of its obligations contained in the Lease, any insolvency or bankruptcy of Lessor, or for any other cause.

(Id., ¶ 10(a)(ii))

provisions do not apply where a lessee retains possession of equipment due to lessor's failure to provide shipping instructions. Otherwise, a lessor could enjoy a veritable windfall. See Barton v. Gray, 24 N.W. 638, 643 (Mich. 1885)("No person can complain of an injury caused by the act or conduct of a party to which he has consented; and no one who causes or sanctions the breach of an agreement can recover damages for its non-performance, or interpose it as a defense to an action upon the contract."). Plaintiff's duty to designate a shipping location was a condition precedent to defendant's duty to ship. Moreover, "hell or high water" provisions in finance lease agreements are intended to insure that the lessee bears the risks associated with the purchased property, rather than the equity investor. Its application in the present case would cause defendant to bear a risk wholly unrelated to that intent. Consequently, the court concludes that plaintiff is not entitled to rent under the Master Lease for Schedule 1.

33. Returned equipment, under the Master Lease, must be in working condition and good repair, less normal wear and tear. In particular, all hardware must be present, including hard drives, disk drives, etc. In the event any of the Equipment is damaged or missing, defendant is responsible for replacing or repairing the equipment. (PTX 1, ¶ 6(d))

34. The court finds that defendant failed to comply with

the Master Lease's requirements for return of the Equipment by failing to return all of the Equipment listed on Schedule 1 and failing to return the Equipment in proper condition. That failure is a breach of the Master Lease for which plaintiff is entitled to damages under the contract.

35. To recover damages for a breach of contract, a plaintiff must prove by a preponderance of the evidence that damages arose naturally from the breach or that they were contemplated by the parties at the time the contracting. See In re Brown, 342 F.3d at 632.

36. In the present case, the Master Lease provides for the payment of a Stipulated Loss Value in the event the equipment is irreparably damaged. (PTX 1, ¶ 13) Under the Master Lease, if the equipment were irreparably damaged, defendant could elect to either pay the Stipulated Loss Value or replace the irreparably damaged equipment. The Stipulated Loss Value in the final month of the Master Lease was 31.57% of the original equipment cost. (PTX 2) Consequently, the court concludes that plaintiff is entitled to the Stipulated Loss Value for the missing equipment, or $104,557.71. (PTX 23)

37. Plaintiff contends that it is also entitled to $30,626.34 for damages related to the cost of repairing equipment that was damaged or missing components. (D.I. 92 at 21) The Master Lease requires that defendant return the equipment "in the

same operating order, repair, condition and appearance as of the Installation Date, reasonable wear and tear excepted." (PTX 1, ¶ 6(d)) That requirement, however, must be read in conjunction with the Stipulated Loss Value for the equipment. In the present case, the Stipulated Loss Value is the parties' agreement as to what plaintiff's expectancy interest is in the equipment. Consequently, with respect to equipment that was returned to plaintiff in damaged condition, the court concludes that plaintiff is entitled either to the cost of repairing the equipment or to the Stipulated Loss Value, whichever is less. Consistent with paragraph 16(b) of the Master Lease, the above amount will be offset by any amount that plaintiff received consistent with its duty to mitigate. (PTX 1) This is supported by plaintiff's own witness's testimony that damaged equipment was scrapped and not resold. (D.I. 87 at 176)

38. While plaintiff alleges $30,626.34 in damages for the cost of missing or damaged components, that amount must be reduced by the charges related to the Acer computers, which by the court's calculation accounts for approximately half of the asserted damages. Consequently, plaintiff is entitled to $15,323.17 for losses related to Equipment returned in damaged condition.

39. Under the Master Lease, interest accrues at two percent

(2%) per month for amounts more than five days past due.[6] (PTX 1, ¶ 3(b))

40. The Master Lease provides that, "[u]pon redelivery to Lessor, Lessee shall arrange and pay for such repairs (if any) as are necessary for the manufacturer of the Equipment to accept the Equipment under a maintenance contract at its then standard rates." (PTX 1, ¶ 6(d)) The Master Lease is silent, however, as to when amounts owed arising from the return of Equipment become due. Prior to filing the complaint, the record does not show that plaintiff made a specific demand to defendant for payment for amounts arising from the return of the Equipment. Accordingly, the court finds that interest, at the contract rate of 24% per annum, began accruing on December 11, 2001, the date the complaint was filed. Consequently, plaintiff is entitled to interest in the amount of $63,454.76.

III. CONCLUSION

For the reasons stated above, judgment will be entered in favor of plaintiff in the total amount of $119,880.88 plus interest in the amount of 63,454.76.

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[6]Defendant contends that Michigan's Usury Statute prohibits the charging of interest in excess of 7% per annum. Defendant's contention is without merit as the Master Lease clearly falls within the business entity exception. Mich. Comp. Laws § 438.61(c).

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FOR THE DISTRICT OF DELAWARE

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	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 01-821-SLR
	)	
TCIM SERVICES, INC.,	)	
	)	
Defendant.	)	

O R D E R

At Wilmington, this 24th day of February, 2004, consistent with the opinion issued this same day;

IT IS ORDERED that:

1. The clerk shall enter judgment in favor of plaintiff Relational Funding Corporation and against defendant TCIM Services, Inc. in the amount of $119,880.88 plus accrued interest in the amount of $63,454.76.

2. Pursuant to Fed. R. Civ. P. 54(d)(2), any motion by plaintiff for attorney fees shall be filed no later than March 9, 2004.

Sue L. Robinson
United States District Judge